No. 86-884

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS JEWEL COMPANIES, INC. AND JOHNNY VAUGHN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JAMES T. FERRINI *
PAUL D. SHELDON
CLAUSEN MILLER GORMAN
CAFFREY & WITOUS, P.C.
5400 Sears Tower
Chicago, Illinois 60606
(312) 876-1900

Attorneys for Respondents Jewel Companies, Inc. and Johnny Vaughn

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1) Whether there is a "conflict" among authorities warranting review by this Court merely because courts reach different results based upon different facts, while applying identical principles of law.

2) Should certiorari be granted for the purpose of having this Court independently weigh the evidence to determine whether the Circuit Court of Appeals properly granted summary judgment to defendant in a section 1983 action where:

   —both the defendant and the police officers testified that there was no pre-conceived plan or agreement between them;

   —this testimony was uncontradicted; and

   —plaintiff's only evidence of a "pre-conceived plan" giving rise to a section 1983 action is that (1) the defendant, a national grocery store chain, kept pre-printed complaint forms on hand, and (2) police officers testified that where a private security guard employed by the defendant was an eyewitness to a shoplifting offense, signed a written complaint, and desired to press charges against the shoplifter, police would then arrest the shoplifter.

PARTIES

All parties to the appeal are listed in the caption. Further, in compliance with Rule 28.1, Jewel Companies, Inc. states that its parent corporation is American Stores, Co. and that it is presently compiling information with respect to the identity of Jewel Companies' subsidiaries and affiliates. (*See* letter to Clerk of the Court, dated December 22, 1986.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. GRAMENOS,

Petitioner,

v.

JEWEL COMPANIES, INC., JOHNNY VAUGHN, JOSEPH SCHMIT, FRANK COSGROVE, and SGT. FRANK HEATLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

BRIEF FOR RESPONDENTS JEWEL COMPANIES, INC. AND JOHNNY VAUGHN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

This case involves no issue which merits Supreme Court review. There are no "special and compelling" reasons, as required by Rule 17.1 of this Court (28 U.S.C. Rule 17.1 (1984)), nor does the case involve principles the settlement of which is of importance to the public as distinguished from that of the parties, nor is there a "real and embarrassing" conflict of opinion between the circuit courts of appeal which would warrant such review, as stated in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954).

I.

THERE IS NO "CONFLICT" AMONG THE VARIOUS DECISIONS DECIDED BY PLAINTIFF; THERE ARE ONLY DIFFERENT RESULTS JUSTIFIED BY DIFFERENT FACTS.

The cases upon which plaintiff relies are not "in conflict" with the opinion of the circuit court below. Rather, they are cases in which *different facts* required *different results.*

A. The Seventh Circuit Opinion Is Not In Conflict With Opinions From Other Circuits.

Probable cause is a "fluid concept—turning on the assessment of probabilities and particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). In other words, whether the probable cause requirement is met in any given circumstance is dependent upon the facts of the particular case. All of the cases cited by plaintiff are factually distinguishable and are actually supportive of defendants' position. None of the cases relied on by plaintiff involve an eyewitness who signed a written complaint and who informed police of the details of what he observed, as in the instant case. (797 F.2d at 433, 437.) None of the cases involved an independent police investigation prior to the arrest, as was performed in the instant case. (797 F.2d at 437.)

In *Duriso v. K-Mart*, 559 F.2d 1274 (5th Cir. 1977), no one saw the plaintiff conceal any merchandise upon his person. Indeed, the plaintiff had left the cigarettes that he was accused of stealing on a shelf in the store, and had left the store prior to his being stopped and arrested. No stolen merchandise was found on his person during a police search. Further, there is no indication in the *Duriso* opinion that the police were told any details of

the plaintiff's conduct, nor were they apparently told anything other than to arrest the plaintiff. To the contrary, in the instant case, respondent Johnny Vaughn was an eyewitness (797 F.2d at 439), who had seen Gramenos place merchandise in his pockets (*Id.* at 433) and pass through the check-out line without paying for the merchandise (*Id.* at 439). Vaughn related these facts to the police (797 F.2d at 438, 439), and recovered the items which Gramenos had thrown from his pockets after being stopped by Vaughn (*Id.* at 433, 438).

Thus, the Fifth Circuit's holding in *Duriso* that the jury verdict was not reversible, even though there were contrary inferences to be drawn from the evidence (559 F.2d at 1278), does not place the *Duriso* decision "in conflict" with the decision in the instant case.

Similarly, in *Smith v. Brookshire Bros.*, 519 F.2d 93 (5th Cir. 1975), the police were not told the manner of apprehension of the plaintiffs, there was no written complaint signed before the arrest of the plaintiff, subsequent to the arrest a store officer signed a blank piece of paper in lieu of a complaint, and, most importantly, the plaintiff had not yet gone through the check-out lane when she was stopped and arrested for shoplifting. Given these facts, the Fifth Circuit found that there was no probable cause for the arrest. However, defendants respectfully submit that the Fifth Circuit would have come to a contrary conclusion if, as here, the plaintiff had passed through the check-out line without paying for the items, the police were advised as to details of plaintiff's behavior and apprehension, and a written complaint was signed prior to the arrest. (*See* 797 F.2d at 433, 437, 438, 439.)

The decision of the Tenth Circuit in *Lusby v. T. G. & R. Stores, Inc.*, 749 F.2d 1423 (10th Cir. 1984), *cert. granted* 106 S.Ct. 40 (1985), *aff'd on remand* 796 F.2d 1307 (1986), is likewise consistent with the Seventh Circuit's opinion

in the instant case. In that case, plaintiff was arrested before a complaint had been signed, and it was admitted that no independent investigation had been undertaken by police officers. Where, as here, a written complaint was signed before the arrest, and police were provided with details of the plaintiff's behavior from an eyewitness and took statements from other witnesses, defendants respectfully submit that the Tenth Circuit, applying the same principles of probable cause as were applied in the instant case, would also find that there was probable cause for arrest.

Finally, the decision of *El Fundi v. Deroche*, 625 F.2d 195 (8th Cir. 1980), did not involve any factual determination by the court of appeals. That case was not decided upon a motion for summary judgment, as in the instant case, but on a motion for dismissal, where, taking all the allegations contained in the complaint as true, the Eighth Circuit held only that it could not say that no set of facts could ever be proved which would entitle plaintiff to recovery. 625 F.2d at 196.

Thus, the "conflict" argued by plaintiff is non-existent. In all of these decisions, the same legal principles were applied, and were applied in the same manner. It is the difference in *facts*, not in legal principle, which give rise to the different results in the cases. The plaintiff's "conflict" argument is completely without merit.

B. The Decision At Bar Is Not "In Conflict" With Prior Decisions Of The Seventh Circuit.

Plaintiff's reliance on *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336 (7th Cir. 1985), as being "in conflict" with the decision of the Seventh Circuit in the instant case, is erroneous. *Moore* involved a warrantless entry into a home, and there was a significant question in *Moore* as to whether the conduct of plaintiffs (walking out of a

restaurant without paying a bill for food not yet served) was a theft or merely a breach of contract dispute. *Moore*, 754 F.2d at 1345. Central to the Court's reasoning in *Moore* was that the police officers did not arrest the plaintiffs at the scene of the "crime" but traveled to plaintiffs' camp site and arrested them after asking only one question: whether they were present in the restaurant on that particular night. 754 F.2d at 1345. The opinion below in the instant case specifically pointed out these differences in *Moore*. (*See* 797 F.2d at 438.)

Again, the facts in *Moore* are completely unlike those in the case at bar, and the two cases are not "in conflict," but simply reach different results based on differing facts.

C. The Seventh Circuit Opinion Below Is Not In Conflict With Decisions Of This Court.

The lower court opinion in this case is not in conflict with *Illinois v. Gates*, 462 U.S. 213 (1983). In *Gates*, this Court abandoned the two-pronged *Aguilar* and *Spinelli* tests, in favor of the "totality of the circumstances" analysis. *See* 462 U.S. at 238. This Court described the *Gates* standard as flexible, easily applied. . . ." 462 U.S. at 239.

Plaintiff's sole argument is that the lower court's opinion in the present case is "in conflict" because it described the *Gates* standard in a parenthetical remark as a "lower standard of probable cause." However, plaintiff does not argue that a "lower" standard of probable cause was actually applied, nor does plaintiff attempt to explain in what way the standard was allegedly "lower." Indeed, the opinion of the Seventh Circuit clearly shows that the "totality of the circumstances" test was applied. (*See* 797 F.2d at 439-440.)

Plaintiff has merely seized upon *dicta* of the lower court, and cannot show this Court any "conflict."

D. The Seventh Circuit Decision Is Not In Conflict With Decisions Of The Illinois Supreme Court.

The opinion of the circuit court below is not in conflict with *People v. Tisler*, 103 Ill.2d 226, 469 N.E.2d 147 (1984). Plaintiff's quotations from *Tisler* show nothing more than that Illinois has adopted the *Gates* "totality of the circumstances" standard, which is completely consistent with the circuit court's opinion in the instant case. (*See* 797 F.2d at 438-40.)

Plaintiff tries to obfuscate the issue by pointing to two opinions of the Illinois Appellate Court which plaintiff claims are in conflict. The two decisions are not in conflict, nor are they in any way relevant to any claimed conflict between the Illinois Supreme Court and the Circuit Court of Appeals in the instant case.

Contrary to plaintiff's assertion, *People v. Foss*, 18 Ill. App.3d 496, 309 N.E.2d 677 (1974), does stand for the proposition that an eyewitness identification of the perpetrator of a crime can constitute probable cause which would support a legal arrest:

> The police officer was perfectly justified in making the arrest as the bartender stated to the police officer that she wanted to sign a complaint against the defendant for disorderly conduct and pointed the defendant out to the officer.

309 N.E.2d at 679.

The case which plaintiff cites as contrary, *Dutton v. Roo-Mac, Inc.*, 100 Ill.App.3d 116, 426 N.E.2d 604 (1981), has nothing to do with probable cause, but addressed whether the defendant had "reasonable grounds" under an Illinois statute to believe that plaintiff was committing criminal trespass to land when he returned to a restaurant from which he had been banned. The Appellate Court held that the case resolved itself into a question of credibility of

the witnesses, stating that there was "competent evidence to support the versions of both parties, but the court apparently chose to accept that of the plaintiff." 100 Ill.App. 3d at 12.

In summary, there is no conflict between the Seventh Circuit Court of Appeals opinion in the instant case and the Illinois Supreme Court. Some Illinois appellate courts have reached different results based upon different facts, but this does not constitute a "real and embarrassing" conflict, nor does it relate to any conflict between the Illinois Supreme Court and the decision in the instant case.

II.

CERTIORARI SHOULD NOT BE GRANTED TO WEIGH PLAINTIFF'S EVIDENCE AGAIN; THERE WAS NO PRECONCEIVED PLAN OR AGREEMENT GIVING RISE TO A SECTION 1983 ACTION.

Plaintiff claims no conflict among authorities with respect to his "customary" plan or agreement argument, but asks this Court to weigh the evidence anew and determine whether two pieces of evidence constitute a "customary plan". Even a cursory review of the "evidence" quickly reveals that there is no issue meriting review by this Honorable Court.

The mere fact that Johnny Vaughn signed his complaint outside the presence of the arresting officer violates no federal law or constitutionally protected right. An alleged violation of a state statute does not give rise to a corresponding Section 1983 violation, unless the right encompassed in the state statute is guaranteed under the United States Constitution. *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1349 (7th Cir. 1985). As noted below, Gramenos has not even tried to explain how his position can be reconciled with *Moore*. (797 F.2d at 434.) Furthermore, the cases cited by plaintiff for the broad proposi-

tion of law that an abuse of the state court system can constitute a violation of Section 1983 are both factually and procedurally distinguishable.

Carrasco v. Klein, 381 F.Supp. 782 (E.D.N.Y. 1974), and *United States v. Wiseman*, 445 F.2d 792 (2nd Cir. 1971), both involved actions by process servers, where the Second Circuit had held explicitly that service of process is an act of public power (*see Wiseman*, 445 F.2d at 796), and found that process server cases fell within a narrow class of "public function" cases. Further, the *Carrasco* decision was based on a motion to dismiss, not on a motion for summary judgment, as plaintiff would have this Court believe. *See* plaintiff's Petition, p. 25.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 299 (1982), this Court held that petitioner presented a valid cause of action under Section 1983 "insofar as he challenged the constitutionality of the Virginia statute; he did not insofar as he alleged only misuse or abuse of the statute." 457 U.S. at 942. Thus, *Lugar* directly supports the Seventh Circuit's opinion in the case at bar.

The remainder of plaintiff's argument is based solely upon certain deposition testimony, and the Petition requests that this Court independently review that deposition testimony to decide whether the magistrate, district court, and circuit court of appeals erred in their assessment of the import of that testimony. Not only does this fail to present a question "beyond the episodic," (*see Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1954)), but even a cursory review of the testimony shows the patent inadequacy of plaintiff's argument. The testimony quoted on page 26 of plaintiff's Petition means nothing more than that the police officers would arrest a suspected shoplifter where an eyewitness signed a complaint and Jewel decided to press charges, *i.e.*, "wanted the individual arrested."

The testimony recounted on page 28 of plaintiff's Petition establishes only that Mr. Gramenos was given the opportunity to pay for the articles, rather than be arrested, but declined to do so. Plaintiff's assertion that this testimony "conclusively shows that the police relied upon the Jewel security guard to tell them what to do," (plaintiff's Petition at p. 29), is a complete *non sequitur*.

In summary, there is absolutely nothing of substance in plaintiff's Petition for Certiorari. The facts contained in the record have been reviewed by the Magistrate, the District Court and the Seventh Circuit Court of Appeals, and the determination of those honorable courts that no fact question was presented by the evidence does not merit or require review by this Court.

CONCLUSION

For the reasons stated, and upon the authorities cited, defendants-respondents Jewel Companies, Inc. and Johnny Vaughn respectfully request that this Court deny the Petition for Certiorari in its entirety.

Respectfully submitted,

JAMES T. FERRINI *
PAUL D. SHELDON
CLAUSEN MILLER GORMAN
CAFFREY & WITOUS, P.C.
5400 Sears Tower
Chicago, Illinois 60606
(312) 876-1900

Attorneys for Respondents Jewel Companies, Inc. and Johnny Vaughn

* Counsel of Record